IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 30TH MARCH 2007 / 9TH CHAITHRA 1929

Crl.L.P..No. 160 of 2007()

CC.90/2005 of J.M.F.C.-II, KASARAGOD

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: PETITIONER/COMPLAINANT:

V. GOPALAKRISHNA BHAT,
S/O.LATE GOVINDA BHAT, AGED 64 YEARS,
RESIDING AT CHAKATE HOUSE,
KATUKUKKE VILLAGE, KASARAGOD TALUK,
BALEMOOLA POST.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN
SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON

RESPONDENTS: ACCUSED & STATE:

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1. ABDUL KHADER, S/O.SEEDI BEARY,
CHERUNI HOUSE, KUMBADAJE VILLAGE,
KASARAGOD TALUK, P.O. MOOVAR.

2. THE STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R1 BY ADV. SRI.T.K.VIPINDAS
R2 BY PUBLIC PROSECUTOR SRI P.RAVINDRA BABU

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD ON 30/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.L.P. 160 OF 2007

DT. MARCH 30, 2007

ORDER

This is an application for special leave to appeal against the judgment in C.C.No.90/2005 on the file of the Judicial Magistrate of First Class Court-II, Kasaragod. The petitioner/complainant filed a complaint alleging that the 1st respondent had issued a cheque for an amount of Rs.3 lakhs on 1.11.2002 in discharge of the said amount as owed by him to the complainant. But when the cheque was presented for encashment, the same was dishonoured due to the insufficiency of funds to honour the cheque in the account of the respondent. On getting intimation from the bank regarding the dishonour, the petitioner/complainant caused to send Ext.P4 lawyer's notice demanding payment of the amount covered by the cheque. But, in spite of the receipt of the said notice, as the respondent had not paid the amount covered by the cheque, a complaint has been filed before the court alleging that the respondent had committed an offence punishable under sec.138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act). To prove his case against the respondent, the petitioner/complainant examined himself as PW.1 and relied on Exts.P1 to P6. After closing the evidence of the petitioner./complainant, the respondent was questioned under sec.313 Cr.P.C. Denying the allegations in the complaint, the respondent had stated that he had no transaction with the appellant which led to the issuance of Ext.P1 cheque as alleged in the complaint. The respondent had further stated that the cheque in question was issued by him to one Sathyanarayana

Bhat in connection with the loan taken from him as a security and the same was not issued in favour of the petitioner/complainant at all. On considering the entire evidence the trial court found that the petitioner/complainant miserably failed to prove the transaction between the petitioner/complainant and the respondent which led to the issuance of Ext.P1 cheque in favour of the complainant and accordingly the respondent has been acquitted. Against the acquittal this special leave petition is attempted. This court heard the learned counsel appearing for the petitioner and perused the records made available to this court. This court also had gone through the deposition of the complainant and other documents. The specific case set up by the complainant in the complaint is that the respondent is known to him for the last 20 years and all on a sudden on 11.1.2002 the respondent approached him and he was in urgent need of money and therefore he had given an amount of Rs.3 lakhs to the respondent. To discharge the said amount Ext.P1 has been issued on the same day. The further case of the petitioner/complainant is that the cheque was issued at the Sathyanarayana Mandiram when the respondent met him at that Mandiram. It is also the case of the petitioner/complainant that the cheque in question was written in the handwriting of the respondent and it was written by the respondent before him. With the above allegation evidence has been adduced. The case set up by the respondent in the statement under sec.313 Cr.P.C. and when PW.1 was cross-examined is that the cheque in question was issued to one Sathyanarayana Bhat as a security for a loan which the respondent had taken from him and not given to the petitioner/complainant. The trial court had

considered the evidence adduced by the petitioner/complainant and came to the conclusion that as per the report of the handwriting expert, it was reported that the handwriting in Ext.P1 cheque was not tallying with that of the handwriting of the respondent and hence it was conclusively proved that there is no evidence to show that the cheque in question was filled up by the respondent himself. Hence the trial court had found that the evidence given by the petitioner/complainant that the respondent had filled up the cheque in question before him was found false and that apart the trial court had conclusively held that the petitioner/complainant failed to prove the transaction between the appellant and the respondent and there is no other corroborative piece of evidence to show that the petitioner/complainant had paid an amount of Rs.3 lakhs to the respondent on 1.11.2002 as alleged in the complaint. No witness was examined and Pw.1 (the complainant himself) has admitted that nobody was present at the time of handing over the money at the Sathyanarayana Mandiram. It is unbelievable to see that a person like the petitioner would depart an amount of Rs.3 lakhs without the presence of anybody else and that too had paid at the Sathyanarayana Mandiram. It is common case that the Sathyanarayana Mandiram is a public place in which ordinarily some other persons other than the petitioner/complainant and the respondent would also be present. In the above circumstances the petitioner/complainant failed to prove the transaction between the petitioner/complainant and the respondent. As per sec.118 of the Act, there are some presumptions available to the petitioner/complainant with regard to the consideration, date and time of acceptance, endorsement etc. But these

presumptions could be drawn only when the transaction is proved. In this case as the complainant failed to prove the very transaction, he is not entitled for the presumptions available to the petitioner/complainant under sec.118 and sec.139 of the Act. To attract an offence under sec.138 of the Act, the petitioner/complainant should prove that there was a transaction between petitioner/complainant and the accused and in pursuance to that transaction a consideration has been passed on and on the basis of the receipt of such consideration, the negotiable instrument viz. the cheque has been passed by the respondent. If these three ingredients are not proved, this court cannot come to a conclusion that there exists a legally enforceable debt so as to attract an offence under sec.138 of the Act. In the above circumstances and on appreciation of the evidence, this court see that the judgment of the trial court requires no interference. Accordingly this special leave petition stands dismissed.

K.THANKAPPAN, JUDGE.

mt/-